

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MIKESHIA MORRISON, on behalf of herself and all others similarly situated,

Plaintiff,

V.

ESURANCE INSURANCE CO., a  
foreign automobile insurance company,

**Defendant.**

C18-1316 TSZ

## ORDER

THIS MATTER comes before the Court on Plaintiff's Motion for Class

**Certification and Appointment of Class Counsel and Class Representatives, docket**

no. 57. The Court held oral argument on January 24, 2020. Having reviewed all papers

filed in support of and in opposition to the motion and considered the arguments of

counsel, the Court DENIES class certification.

## Background

Plaintiff Mikeshia Morrison (“Morrison” or “Plaintiff”) was injured in an automobile collision on March 6, 2018. Morrison Decl., docket no. 62, ¶ 3. As a result of the collision, Morrison sustained injuries to her neck, spine, and back. *Id.* ¶ 4.

1 Morrison submitted a Personal Injury Protection (“PIP”) claim with her insurer, Esurance  
2 Insurance Company (“Esurance” or “Defendant”) seeking wage loss and medical  
3 benefits. Gribble Decl., docket no. 64, ¶ 4. Esurance paid more than \$16,000 in  
4 connection with Plaintiff’s claim. *Id.*

5 Esurance requested Morrison undergo an independent medical exam to determine  
6 whether Morrison had reached Maximum Medical Improvement (“MMI”). Morrison  
7 Decl., docket no. 62, ¶ 7. After Morrison’s June 6, 2018 examination, the examiner  
8 issued a report, finding in pertinent part that “Ms. Morrison is at maximum medical  
9 improvement. There [are] no positive objective findings observed during this  
10 examination that physiologically will identify her symptoms.” Rogers Decl., docket no.  
11 59-1 at 10, Ex. A.

12 On June 7, 2018, the Washington Supreme Court issued its decision in *Durant v.*  
13 *State Farm Mut. Auto. Ins. Co.*, 191 Wn. 2d 1 (2018). In *Durant*, the Washington  
14 Supreme Court answered two certified questions<sup>1</sup> concerning (1) whether an insurer  
15 violates the Washington Administrative Code (hereinafter “WAC”) Section 284-30-  
16 395(1)<sup>2</sup> if that insurer “denies, limits, or terminates an insured’s medical or hospital  
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18 <sup>1</sup> The district court certified the two questions after granting class certification in *Durant v. State Farm*  
19 *Mut. Auto. Ins. Co.*, 2017 WL 950588 (W.D. Wash. Mar. 9, 2017). In *Durant*, Plaintiff sought class  
certification against State Farm based on its use of the MMI standard to deny coverage for personal injury  
claims. *Id.* at 2. State Farm used reason codes to deny and limit insured benefits. *Id.* at 4.

20 <sup>2</sup> The WAC provides in pertinent part that “the insurer may deny, limit, or terminate benefits if the insurer  
21 determines that the medical and hospital services: (a) Are not reasonable; (b) Are not necessary; (c) Are  
22 not related to the accident; or (d) Are not incurred within three years of the automobile accident. These  
are the only grounds for denial, limitation, or termination of medical and hospital services permitted.”  
WAC 284-30-395(1).

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1 benefits claim based on a finding of MMI,” and (2) whether the term MMI is consistent  
2 with the terms “reasonable” and “necessary” as they appear in WAC 284-30-395(1). *Id.*  
3 at 7. The court held that “an insurer violates WAC 284-30-395(1)(a) or (b) if that insurer  
4 denies, limits, or terminates an insured’s medical or hospital benefits claim based on a  
5 finding of ‘MMI.’”<sup>3</sup> *Id.* at 18-19. The court further held that the only bases upon which  
6 insurance companies can deny, limit, or terminate PIP benefits are when treatment is not  
7 (1) reasonable, (2) necessary, (3) related to the accident, or (4) incurred within three years  
8 of the accident. *Id.* at 14.

9 On June 14, 2018, an Esurance claims representative emailed Morrison’s attorney  
10 stating that “[b]ased on the [medical examiner’s] report, it does not appear further wage  
11 loss benefits would be owed under this loss, as your client is deemed at MMI for her  
12 motor vehicle injury.” Rogers Decl., docket no. 59-2, Ex. B. On June 15, 2018, the  
13 Esurance claims representative “drafted” a discontinuation of benefits letter, which she  
14 sent to her supervisor. Gribble Decl., docket no. 64, ¶ 7. The draft letter stated that  
15 “[b]ased on the findings in the [medical examiner’s] report, Manipulative Therapy,  
16 Massage Therapy, and Chiropractic Treatment were found not to be medically necessary  
17 and related to the motor vehicle accident in question. Esurance Insurance Company has  
18 determined that further benefits under your First Party Medical coverage [are] no longer

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20 <sup>3</sup> At oral argument, counsel disagreed regarding whether the *Durant* court held that insurers violate WAC  
21 284-30-395(1) when they terminate benefits based on a finding of MMI or whether *Durant* prohibits the  
22 use of MMI as one of the many bases for terminating medical benefits. Although the Court believes the  
former reading is the clear conclusion of the Washington Supreme Court, the Court reaches the same  
result regardless of the reach of *Durant*.

1 reasonable, necessary or related . . .” Gribble Decl., docket no. 64-3, Ex. C. The draft  
2 letter did not include the use of the term “MMI.” In response to the draft letter, the  
3 Esurance supervisor stated, “[w]ill hold until after WA new case discussion on  
4 Mon...fyi...thanks.” Rogers Decl., docket no. 59-3, Ex. C.

5 On June 20, 2018, the Esurance claims representative emailed her supervisor  
6 stating, “Circling back on this one. In my discontinuation letter, I didn’t use the term  
7 ‘MMI.’ Dr[.] states no further treatment is necessary or related.” *Id.* In response, the  
8 supervisor stated, “Yes good to go...good job w/wording and not using MMI...ok to  
9 discontinue.” Rogers Decl., docket no. 59-4, Ex. D. That same day, Esurance sent  
10 Morrison a letter discontinuing further benefits. Morrison Decl., docket no. 62-2, Ex. B.  
11 Morrison contends that she continues to suffer from pain in her pelvis, hip, stomach,  
12 neck, and back. Morrison Decl., docket no. 62, ¶ 9.

13 On August 6, 2018, Plaintiff filed a class action against Esurance in King County  
14 Superior Court based on Esurance’s use of the MMI standard to deny and limit her  
15 coverage. Docket no. 1. Esurance removed the action to this Court on September 6,  
16 2018. *Id.* Plaintiff amended her complaint to include six causes of action for declaratory  
17 relief, breach of contract, Insurance Fair Conduct Act (“IFCA”) violations/bad faith,  
18 Washington Consumer Protection Act (“CPA”) violations, common law bad faith, and  
19 breach of the implied covenant of good faith and fair dealing. Docket no. 8.

20 Plaintiff now seeks to appoint class counsel and to certify a class comprised of:

21 All first party insureds and all third-party beneficiaries of any automobile  
22 insurance policies issued by Esurance in the State of Washington, who made a  
23 claim for PIP benefits and Esurance terminated their PIP benefits, limited their

1       benefits, utilized MMI in the adjustment of PIP benefits, or denied coverage for  
2       future treatment of injuries based on Esurance's contention that the  
3       insured/beneficiary had reached MMI, or that such treatment or benefits were not  
4       essential in achieving MMI for the injuries arising out of the automobile accident.<sup>4</sup>

5       Motion for Class Certification, docket no. 57 at 10.

6       By Minute Order dated April 17, 2019, the Court granted Plaintiff discovery  
7       related to class certification. Docket no. 35. As a result, the parties were able to provide  
8       the Court with Defendant's records relating to their decisions to limit or terminate the  
9       benefits of possible class members.

## **Discussion**

### **A. Standard for Class Certification**

10       Rule 23 operates as "an exception to the usual rule that litigation is conducted by  
11       and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569  
12       U.S. 27, 33 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). To  
13       maintain a class action, a plaintiff must "affirmatively demonstrate" compliance with

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15       <sup>4</sup> At oral argument, the Court provided counsel with narrowed language for a possible class definition as  
16       follows:

17       All Esurance insureds in the state of Washington who, from August 6, 2012 to August 6, 2018,  
18       had a Personal Injury Protection (PIP) claim denied, terminated, or limited by Esurance based in  
19       part on the ground that they had reached Maximum Medical Improvement.

20       Plaintiff's counsel indicated that Plaintiff's only objections to the Court's proffered definition were that  
21       it did not include third parties or those class members where Esurance merely used MMI in the claims  
22       handling process. As to Plaintiff's first objection, however, based on Esurance's own policy, "insureds"  
23       includes third party vehicle occupants and pedestrians struck by the insured's vehicle. Rogers Decl.,  
24       docket no. 59-5 at 5, Ex. E. Regarding Plaintiff's second objection, it is not clear whether the mere use of  
25       MMI in claims handling constitutes a violation of WAC 284-30-395(1) under *Durant*. The *Durant* court  
26       held that *limiting or denying* benefits based on a finding of MMI violates the WAC. *Durant*, 191 Wn. 2d  
27       at 18. The *Durant* court did not expressly hold that the mere mention of MMI would constitute a  
28       violation. Defendant objected to any class definition and specifically objected to the "based in part"  
29       language proposed by the Court.

1 Rule 23. *Comcast Corp.*, 569 U.S. at 33 (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S.  
2 338, 350 (2011)). Before a class may be certified, plaintiff must prove (1) the class is so  
3 numerous that joinder of all members is impracticable; (2) questions of law or fact  
4 common to the class exist; (3) the representative’s claims are typical of the claims of the  
5 class; and (4) the representative will “fairly and adequately” protect the interests of the  
6 class. Fed. R. Civ. P. 23(a).

7 If Plaintiff satisfies the Rule 23(a) requirements, she must also show, through  
8 evidentiary proof, that the proposed class action meets at least one of the provisions of  
9 Rule 23(b). *Comcast Corp.*, 569 U.S. at 33. This analysis is “rigorous” and may “entail  
10 some overlap with the merits of the plaintiff’s underlying claim.” *Wal-Mart Stores, Inc.*,  
11 564 U.S. at 351. Plaintiff seeks certification under Rule 23(b)(2) & (3).

12       **B. Rule 23(a)**

13           **1. Numerosity**

14 Plaintiff’s proposed class satisfies the numerosity requirement of Rule 23(a).  
15 Plaintiff attached sample coverage denial letters purportedly showing that Esurance used  
16 an MMI standard to adjust, limit, or deny PIP benefits. Rogers Decl., docket no. 70, ¶ 4.  
17 Defendant contends that the vast majority of the attached letters do not show that  
18 Esurance used an MMI standard to deny PIP benefits. The Court has reviewed the letters  
19 and concluded that there are sufficient possible claimants to satisfy the numerosity  
20 requirement. *Mortimore v. F.D.I.C.*, 197 F.R.D. 432, 435 (W.D. Wash. 2000).

1                   **2. Commonality**

2         Plaintiff satisfies the commonality requirement of Rule 23(a). The commonality  
3 prong requires the presence of “questions of fact and law which are common to the  
4 class.” Fed. R. Civ. P. 23(a)(2). This requirement has been “construed permissively,”  
5 such that not all legal and factual questions must be the same. *Hanlon v. Chrysler Corp.*,  
6 150 F.3d 1011, 1019 (9th Cir. 1998), *overruled on other grounds by Wal-Mart Stores,*  
7 *Inc.*, 564 U.S. 338. “The existence of shared legal issues with divergent factual  
8 predicates is sufficient.” *Id.* Rule 23(a)(2) may be satisfied by “a single significant  
9 question of law or fact.” *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir.  
10 2012).

11         Here, Plaintiff alleges that “common questions are raised” “apt to drive the  
12 resolution of the litigation.” Motion for Class Certification, docket no. 57 at 15.  
13 Specifically, there is a common question for all class members: did Esurance deny, limit,  
14 or terminate benefits in violation of WAC 284-30-395? The answer to this common  
15 question will “drive the resolution of this litigation.” *Parsons v. Ryan*, 754 F.3d 657, 684  
16 (9th Cir. 2014).

17                   **3. Typicality**

18         “The test of typicality is whether other members have the same or similar injury,  
19 whether the action is based on conduct which is not unique to the named plaintiffs, and  
20 whether other class members have been injured by the same course of conduct.” *Ellis v.*  
21 *Costco Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011) (internal quotations omitted).  
22 Plaintiff satisfies the typicality requirement.

1       Defendant asserts that Plaintiff's claims are not typical because her termination of  
2 benefits letter does not mention MMI and instead states that treatment is not medically  
3 necessary or related to her accident. Defendant's Opposition, docket no. 63 at 22-23.  
4 Plaintiff's denial of benefits letter did not include the explicit use of the term MMI. As a  
5 result of the discovery of Defendant's internal records, however, Plaintiff has offered  
6 evidence that Defendant terminated her claim using the MMI standard.<sup>5</sup> Although class  
7 members' claims will include a unique set of facts based upon individual injuries, that  
8 does not negate the common nature of those claims for the purpose of the typicality  
9 analysis. *Parsons*, 754 F.3d at 685 ("Thus, '[t]ypicality refers to the nature of the claim  
10 or defense of the class representative, and not to the specific facts from which it arose or  
11 the relief sought.'") (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir.  
12 1992)). The Court concludes that Plaintiff satisfies the typicality requirement under Rule  
13 23(a).

14                  **4. Adequate Representation**

15       Courts consider two questions to determine whether the adequacy requirement is  
16 met: "(1) do the named plaintiffs and their counsel have any conflicts of interest with  
17 other class members and (2) will the named plaintiffs and their counsel prosecute the  
18 action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020. Defendant does not  
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21       <sup>5</sup> Esurance initially decided to deny Plaintiff's benefits on the explicit basis that she had reached MMI.  
22 Rogers Decl., docket no. 59-2, Ex. B. Though Esurance excluded reference to the term MMI from the  
denial letter that they eventually sent to Plaintiff, the exclusion appeared to be motivated by an internal  
company discussion of *Durant*. See Exs. C & D to Rogers Decl., docket nos. 59-3 & 59-4.

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1 present credible evidence that Plaintiff or her counsel have conflicts or will fail to  
2 prosecute this action vigorously on behalf of the class.<sup>6</sup>

3       **C. Rule 23(b)(2)**

4       Rule 23(b)(2) contemplates class treatment where “the party opposing the class  
5 has acted or refused to act on grounds that apply generally to the class, so that final  
6 injunctive relief or corresponding declaratory relief is appropriate respecting the class as  
7 a whole.” Fed. R. Civ. P. 23(b)(2). Plaintiff seeks to certify a Rule 23(b)(2) class  
8 because “Esurance has subjected all Class members to common issues of denial of PIP  
9 benefits relying on MMI in violation of WAC 284-30-395.” Motion for Class  
10 Certification, docket no. 57 at 20. Plaintiff contends that the class members are entitled  
11 to common injunctive relief requiring Esurance to adjust its claims using only the  
12 standards set forth in WAC 284-30-395(1). *Id.*

13       Plaintiff’s reliance on Rule 23(b)(2) fails. Plaintiff seeks primarily monetary,  
14 rather than injunctive relief. A class for monetary damages cannot be sustained under  
15 Rule 23(b)(2) unless the monetary relief is merely incidental to injunctive or declaratory  
16 relief. *Wal-Mart Stores, Inc.*, 564 U.S. at 360-61. Injunctive relief requiring Esurance to  
17 comply with WAC 284-30-395(1) and award insured class members retroactive PIP  
18 benefits would also involve an individualized damages inquiry. *Id.* (Rule 23(b)(2)

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21       <sup>6</sup> Defendant contends that Plaintiff is an inadequate representative because she is pursuing claims against  
22 the at-fault driver to recover some of the same damages she seeks in this action. Other members of the  
putative class may also be seeking damages against parties involved in their respective accidents.  
Plaintiff’s involvement in other litigation does not prevent her from being an adequate representative in  
this case.

1 “applies only when a single injunction or declaratory judgment would provide relief to  
2 each member of the class . . . it does not authorize class certification when each class  
3 member would be entitled to an individualized award of monetary damages”). To  
4 calculate the benefits owed to each class member, the Court would have to review  
5 individual medical files and affidavits. *Fosmire v. Progressive Max Ins. Co.*, 277 F.R.D.  
6 625, 636 (W.D. Wash. 2011) (Rule 23(b)(2) class damages “should at least be capable of  
7 computation by means of objective standards and not dependent in any significant way  
8 on the intangible, subjective differences of each class member’s circumstances”)  
9 (quoting *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998)).

10 Further, Esurance represents that it no longer uses an MMI standard to deny,  
11 terminate, or limit PIP benefits claims. After the *Durant* decision, Esurance implemented  
12 a formal prohibition against its adjusters using MMI as the basis for denying or  
13 terminating benefits. See Gribble Decl., docket no. 64, ¶ 23. Any request for injunctive  
14 relief is therefore moot. Plaintiff has failed to show any likelihood of the harm  
15 reoccurring. *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 525 (5th Cir. 2007)  
16 (“Rule 23(b)(2) certification is also inappropriate when the majority of the class does not  
17 face future harm.”). Rather, this action leaves monetary claims for damages the  
18 predominant issue. The Court therefore declines to certify a class under Rule 23(b)(2).

19 **D. Rule 23(b)(3)**

20 Plaintiff also seeks certification under Rule 23(b)(3). A class may be certified  
21 under this subdivision if: (1) common questions of law and fact predominate over  
22 questions affecting individual members and (2) a class action is superior to other means  
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1 to adjudicate the controversy. Fed. R. Civ. P. 23(b)(3). This requirement ensures that  
2 “proposed classes are sufficiently cohesive to warrant adjudication by representation.”  
3 *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 545 (9th Cir. 2013) (quoting *Hanlon*,  
4 150 F.3d at 1022).

5           1. Predominance

6           To satisfy the predominance requirement, common questions of law and fact must  
7 be “a significant aspect of the case . . . [that] can be resolved for all members of the class  
8 in a single adjudication.” *Mazza*, 666 F.3d at 589 (quoting *Hanlon*, 150 F.3d at 1022).

9 Rule 23(b)(3)’s predominance criterion is even more demanding than Rule 23(a).  
10 *Amchem Prods. v. Windsor*, 521 U.S. 591, 623-24 (1997). The Court must analyze each  
11 of Plaintiff’s claims separately to determine whether common questions of law and fact  
12 predominate. *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011).

13           Central to each of Plaintiff’s six causes of action is whether Esurance used the  
14 MMI standard to deny, limit, or terminate claims in violation of WAC 284-30-395(1).  
15 That common issue will resolve most of the elements of the six alleged causes of action.  
16 See *Durant v. State Farm Mut. Auto. Ins. Co.*, 2017 WL 950588, at \*5 (W.D. Wash. Mar.  
17 9, 2017) (proposed class satisfied predominance requirement in class action asserting  
18 IFCA, CPA, and breach of good faith claims because “[c]entral to each cause of action is  
19 whether [the insurer’s] use of the MMI standard to deny claims is unreasonable or an  
20 ‘unfair or deceptive act or practice’”). Therefore, common questions of law and fact  
21 predominate under Rule 23(b)(3).

1           2.     Superiority

2         The Court must also consider whether a class action is superior to individual suits.

3     “A class action is the superior method for managing litigation if no realistic alternative  
4     exists.” *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234-35 (9th Cir. 1996). In  
5     determining whether a plaintiff has satisfied Rule 23(b)(3)’s superiority requirement,  
6     courts consider, among other factors: (i) the class members’ interests in individually  
7     controlling their actions; (ii) the extent and nature of any litigation concerning the  
8     controversy involving class members; (iii) the desirability of concentrating the litigation  
9     in the particular forum; and (iv) the likely difficulties in managing a class action.<sup>7</sup>

10       (i)     *Class Members’ Interests in Individually Controlling Their Actions*

11         Esurance’s PIP policy limit ranges from approximately \$10,000 to \$35,000.

12         Treble damages and attorneys’ fees are also available for CPA and IFCA claims in  
13         Washington (RCW 19.86.090; RCW 48.30.015). If individual damages suffered by each  
14         class member were relatively low, the first factor in the superiority analysis would weigh  
15         in favor of certifying a class. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190  
16         (9th Cir. 2001). Here, the large amount of potential relief and the availability of treble  
17         damages and attorneys’ fees will provide substantial incentive for class members and  
18         their attorneys to prosecute claims individually. *See, e.g., Contos v. Wells Fargo Escrow*  
19         *Co.*, 2010 WL 2679886, at \*7 n.11 (W.D. Wash. July 1, 2010) (alternative to certification

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<sup>7</sup> The parties do not discuss factors (ii) & (iii), and the Court concludes that those factors do not impact  
22         the certification analysis here.

1 was not “no case at all” where statute provided for attorneys’ fees, which would  
2 encourage individual consumers to raise claims); *Fox-Quamme v. Health Net Health Plan*  
3 *of Oregon, Inc.*, 2017 WL 1034202, at \*10 (D. Or. Mar. 9, 2017). This factor therefore  
4 weighs against class certification under Rule 23(b)(3).

5       (ii)     *Manageability Issues*

6           “When the complexities of class action treatment outweigh the benefits of  
7 considering common issues in one trial, class action treatment is not the ‘superior’  
8 method of adjudication.” *Zinser*, 253 F.3d at 1192. Class action treatment is not superior  
9 where “each class member has to litigate numerous and substantial separate issues to  
10 establish his or her right to recover individually.” *Id.*

11          It must be possible for the Court to determine whether a particular Esurance  
12 insured is a member of the class in order to determine who will be entitled to relief and  
13 bound by the final judgment.<sup>8</sup> *Xavier v. Philip Morris USA Inc.*, 787 F. Supp. 2d 1075,  
14 1089 (N.D. Cal. 2011). Although Plaintiff will be able to identify some of the class  
15 members based on the denial letters alone, in most instances, it will be difficult to  
16 determine whether Esurance denied, terminated, or limited PIP benefits using MMI  
17 without further discovery.

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20       <sup>8</sup> There is a “well-settled presumption that courts should not refuse to certify a class merely on the basis  
21 of manageability concerns,” but rather should look to “manageability as one component of the superiority  
22 inquiry.” *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1128 (9th Cir. 2017) (quoting *Mullins v.*  
*Direct Digital, LLC*, 795 F.3d 654, 663 (7th Cir. 2015)). Here, however, manageability is not the only  
factor in the superiority analysis that weighs against certifying a Rule 23(b)(3) class.

1 For example, after class discovery concluded, Plaintiff submitted 103 coverage  
2 denial letters.<sup>9</sup> See Defendant's Surreply, docket no. 79 at 2. Plaintiff contends that all  
3 of these letters support inclusion in the class under the proposed class definition. Plaintiff  
4 also argues that every letter that merely references MMI violates WAC 284-30-395(1).  
5 Defendant contends that 45 of the 103 letters do not meet Plaintiff's own class definition  
6 because it is unclear whether benefits were denied, terminated, or limited.<sup>10</sup> *Id.*  
7 Defendant also contends that 50 of the 58 remaining letters show that Esurance's denial  
8 was based on factors unrelated to MMI.<sup>11</sup> *Id.* at 3. Finally, Defendant contends that  
9 "only 8 letters even come close to supporting Plaintiff's theory, and even those require an  
10 individualized inquiry." *Id.* at 5.

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13 <sup>9</sup> Plaintiff's Reply, docket no. 69, refers to 94 letters; Defendant's count is 103. Regardless of the number  
of letters, the Court's analysis remains the same.

14 <sup>10</sup> For example, one of the 45 letters cited by Defendant states that "Dr. Steven Wilson found that you are  
at maximum medical improvement for the injuries sustained in the 06/28/16 automobile accident, as of  
the date of your examination. Also, in his medical opinion, no further treatment is recommended."  
Rogers Decl., docket no. 68-1 at 14. Plaintiff's proposed class only includes those insureds whose  
benefits were denied, terminated, or limited. The letter does not state that benefits were actually denied,  
terminated, or limited. The submission of additional testimony, records, and affidavits could make clear  
that this insured would be part of the class if, for example, they showed that Esurance terminated benefits  
in connection with the letter. On the face of the letter alone, however, Plaintiff cannot show that this  
insured would be part of the proposed class.

15 <sup>11</sup> One such letter states that "[t]he Independent Medical Examination (IME) physician has advised us that  
in his opinion your client suffered a cervical, upper thoracic strain/sprain . . . and that he has reached his  
Maximum Medical Improvement for this loss. Esurance Insurance Company has determined that further  
benefits under your First Party Medical coverage [are] no longer reasonable, necessary or related, for any  
and all medical treatment, wage loss, household services, [and] diagnostics, effective May 3, 2018. No  
further payments will be considered for services after that date." Rogers Decl., docket no. 68-1 at 3,  
Ex. A. Here, it is not clear if the basis for the medical examiner's recommendation is the MMI mentioned  
in the letter. Rather, it is also likely that Esurance terminated coverage because it was no longer  
reasonable, necessary, or related, which are permissible termination reasons under WAC 284-30-395(1).  
Thus, on the face of this letter, it cannot be assumed that this insured would be part of Plaintiff's proposed  
class.

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1 Plaintiff has already conducted class discovery. Even with that discovery, it is  
2 unclear, based on Plaintiff's own class definition, which insureds would be part of any  
3 proposed class. *See, e.g., supra* notes 10 & 11. Determining who is in the class would  
4 likely require miniature trials.<sup>12</sup> The resources expended on these miniature trials would  
5 likely surpass the resources saved by litigating common issues of law and fact as a class  
6 action. *See Berry v. Transdev Servs., Inc.*, 2019 WL 117997, at \*7 (W.D. Wash. Jan. 7,  
7 2019), *leave to appeal denied*, 2019 WL 3302413 (9th Cir. June 26, 2019); *LaCasse v.*  
8 *Washington Mut., Inc.*, 198 F. Supp. 2d 1255, 1264 (W.D. Wash. 2002) ("Given that the  
9 Court would have to analyze each individual yield spread premium transaction,  
10 adjudication on a class basis would 'devolve into [a] . . . thicket of individualized claims,'  
11 defying the policy of judicial economy underlying Rule 23.") (quoting *Brancheau v.*  
12 *Residential Mortg. Grp.*, 177 F.R.D. 655, 663-64 (D. Min. 1997)). Therefore, this factor  
13 also weighs against class certification under Rule 23(b)(3).<sup>13</sup>

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16 <sup>12</sup> In this regard, the facts here are distinguishable from *Durant*, in which the court certified an otherwise  
17 similar class. The *Durant* court noted "grave" manageability concerns but certified a class despite those  
18 concerns because the defendant insurance company kept detailed records of each claim as well as the  
19 specific basis for each denial. *Durant*, 2017 WL 950588, at \*6 & n.5. Moreover, the insurance company  
defendant maintained reason codes, some of which pertained to coverage denial based on an MMI  
standard. Therefore, the class in *Durant* was more manageable than the class Plaintiff seeks to certify  
here. After discovery in this case, Plaintiff has been unable to produce a similar pattern of tracking  
claims.

20 <sup>13</sup> Defendant also contends that a class action is not manageable because a claim-by-claim review and  
21 readjustment of each insured's claim would be required to calculate damages. The necessity of individual  
damages determinations does not, on its own, defeat class certification. *See Helle v. Knight Transp., Inc.*,  
22 2013 WL 5588311, at \*5 (W.D. Wash. Oct. 9, 2013); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514  
([T]he presence of individualized damages cannot, by itself, defeat class certification  
under Rule 23(b)(3)."); *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975) ("The amount of damages  
is invariably an individual question and does not defeat class treatment.").

1 In sum, a class action would not be the superior method of resolving these claims.

2 | The Court therefore DENIES Plaintiff's Motion for Class Certification.<sup>14</sup>

3 IT IS SO ORDERED.

4 Dated this 6th day of February, 2020.

Thomas S. Bally

Thomas S. Zilly  
United States District Judge

<sup>14</sup> Defendant's Motion to Strike, docket no. 63, is STRICKEN as moot.